90-1358

NO. _____

FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIE ODEN, PETITIONER
V.
LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

LOUISE BRAND, PETITIONER
V.
LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

WILLIAM JENNINGS, PETITIONER
V.
LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

LOYD PERRIN, PETITIONER
V.
LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

The question presented is three-fold: First, should not the Secretary of Health and Human Services take responsibility for the Agency's failure to comply with the administrative fee withholding provisions of 42 U.S.C. § 406? Secondly, should the Webb v. Richardson 6th Circuit doctrine, more commonly known as the on-fee-tribunal rule, be the Law of the Land? Third, should the Eighth Circuit's ruling in Gowen v. Bowen be given retroactive application?

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OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Anthony W. Bartels petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished, but is attached hereto as Appendix A. The opinions of the District Court are unreported, but are attached hereto as Appendix B-E. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the Court of Appeals is attached hereto as Appendix F.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on December 13, 1990. The Petition for Rehearing was denied on February 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant provisions of Title II of the Social Security Act, 20 C.F.R. § 404.1720 (b) (4), 20 C.F.R. § 1730 (b), and 20 C.F.R. § 404.501 (a) (8), are set forth in Appendix G.

STATEMENT

This case concerns 20 C.F.R. § 1720 and 1730, which involve fees for a representative's services on a Title II- claim. In a Title II claim, the Social Security Administration is to withhold and pay the attorney's fee directly to the attorney from a claimant's past due benefits. The case also concerns 20 C.F.R. § 404.501 (a) (8), which provides for adjustment in cases where, through error, a payment of past due benefits is made to an individual and such payment has not been reduced by the amount of attorney's fees payable directly to an attorney under section 206 of the Act.

1. **ODEN**: Willie Oden, through his attorney, Anthony Bartels, appealed the cessation of his disability benefits. The appeal was successful and Social Security ultimately resumed paying benefits on the claim. During the appeal Oden drew interim benefits.

Anthony Bartels petitioned for attorney's fees for Court work, and on 3/23/87 the District Court awarded $1,165.16. In its order, the District Court instructed the Secretary to "compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the administrative level, or twenty-five percent . . . whichever sum is less."

The Social Security Administration subsequently authorized a fee of $1,139.05 for administrative work. Of this amount, SSA withheld and paid only $745.25, leaving a balance of $1,558.96. Anthony Bartels unsuccessfully attempted to collect the balance of his fee from the claimant, but he would not or could not pay. Thus, the attorney asked the District Court to hold the Secretary in contempt for failure to comply with the Court's order to pay $1,165.16 plus the administrative fee. The District Court

held that not only was contempt not available, but there was no other relief permitted.

The Eighth Circuit Court of Appeals affirmed.

BRAND: Louise Brand, through her attorney, Anthony Bartels, appealed the cessation of her disability benefits. The appeal was successful and Social Security ultimately resumed paying benefits on the claim. During the appeal Brand drew interim benefits.

Anthony Bartels petitioned for attorney's fees for Court work, and on 3/7/88 the District Court awarded $2,170.00. In its order, the District Court instructed the Secretary to "compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the administrative level, or twenty-five percent . . . whichever sum is less."

The Social Security Administration subsequently authorized a fee of $2,497.15 for administrative work. Of this amount, SSA withheld and paid only $1,204.20, leaving a balance of $3,462.95. Anthony Bartels unsuccessfully attempted to collect the balance of his fee from the claimant, but she would not or could not pay. Thus, the attorney asked the District Court to hold the Secretary in contempt for failure to comply with the Court's order to pay $2,170.00 plus the administrative fee. The District Court held that not only was contempt not available, but there was no other relief permitted. The Eighth Circuit Court of Appeals affirmed.

JENNINGS: William Jennings, through his attorney, Anthony Bartels, appealed the cessation of his disability benefits. The appeal was successful and Social Security ultimately resumed paying

benefits on the claim. During the appeal Jennings drew interim benefits.

Anthony Bartels petitioned for attorney's fees for Court work, and on 6/25/87 the District Court awarded $2,801.42. In its order, the District Court instructed the Secretary to "compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the administrative level, or twenty-five percent . . . whichever sum is less."

The Social Security Administration subsequently authorized a fee of $1,815.43 for administrative work. Of this amount, SSA withheld and paid only $1,141.15, leaving a balance of $3,475.70. Anthony Bartels unsuccessfully attempted to collect the balance of the fee from the claimant, but he would not or could not pay. Thus, the attorney asked the District Court to hold the Secretary in contempt for failure to comply with the

Court's order to pay $2,801.42 plus the administrative fee. The District Court held that not only was contempt not available, but there was no other relief permitted. The Eighth Circuit Court of Appeals affirmed.

PERRIN: Loyd Perrin, through his attorney, Anthony Bartels, appealed the cessation of his disability benefits. The appeal was successful and Social Security ultimately resumed paying benefits on the claim. During the appeal, however, Perrin drew interim benefits.

The attorney petitioned for attorney's fees for Court work, and on 6/18/87 the District Court awarded $2,890.00. In its Order, the District Court instructed the Secretary to "compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the administrative level, or twenty-five percent. . . whichever sum is less."

The Social Security Administration subsequently authorized a fee of $2,711.70 for administrative work. Of this amount, SSA withheld and paid only $2,299.50, leaving a balance of $3,302.20. Anthony Bartels unsuccessfully attempted to collect the balance of my fee from the claimant, but he could not or would not pay. Thus, the attorney asked the District Court to hold the Secretary in contempt for failure to comply with the Court's order to pay $2,890.00, plus the administrative fee. The District Court held that not only was contempt not available, but there was no other relief permitted. The Eighth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT ERRED IN REFUSING TO ORDER THE SECRETARY OF HEALTH AND HUMAN SERVICES TO TAKE RESPONSIBILITY FOR THE AGENCY'S FAILURE TO COMPLY WITH THE ADMINISTRATIVE FEE WITHHOLDING PROVISIONS OF 42 U.S.C. § 406.

In the consolidated cases of Oden v. Sullivan, No. 89-2911, Brand v. Sullivan, No. 89-2912, Jennings v. Sullivan, No. 89-2913, and Perrin v. Sullivan, No. 89-2914, the Eighth Circuit held that its decision in Pittman v. Sullivan, 911 F. 2d 42 (8th Cir. 1990) controlled these cases. In Pittman, the Eighth Circuit held that it was without authority to direct the Secretary of HHS to pay the petitioner, Anthony Bartels, a duly authorized administrative fee for representing a Title II Social Security disability claimant at the administrative level (App. A).

42 U.S.C. § 406 (a) provides for the award of administrative fees but does not prescribe the mode of payment. Case authority and Department of Health and Human Services internal regulations indicate, however, that the Secretary is to award administrative fees from past-due benefits withheld from the claimant

pending a final determination, POMS § GN 03940.220, or, in those cases where the claimant elects to receive interim benefits, award such fees from interim benefits withheld from the claimant. Gowen v. Bowen, 855 F. 2d 613, 618-19 (8th Cir. 1988) (holding that interim benefits must be treated as past-due benefits for attorney's fees purposes).

In the consolidated cases at bar, the Secretary authorized administrative fee awards but failed to withhold the fees to which the petitioner is entitled from interim benefit payments. The claimants have since spent all interim benefits and are unwilling to voluntarily pay their attorney.

Where administrative errors in withholding occur in the context of past-due benefits cases, and the attorney cannot recoup the funds, the Social Security Administration pays the fee directly to the attorney and charges an

overpayment to the claimant. 42 U.S.C. § 404; 20 C.F.R. § 404.501 (a) (8) (1990) (See, App. E); POMS § GN 03940.300 (A), (C). The Secretary refuses to recoup the funds from the claimants in these interim benefits cases by those means uniquely at the Secretary's disposal, however, leaving the petitioner with no remedy.

It is beyond dispute that pursuant to 42 U.S.C. § 406 (a) the petitioner is entitled to the fee authorized by the Secretary. The only question is whether the Department of Health and Human Services is outside the reach of the federal courts when it refuses to pay such benefits due to its own alleged "error." Because there is much confusion among the circuits regarding the proper role of the federal courts on this particular question and with regard to Social Security attorney fee questions generally, and because important federal questions are here at issue, the petitioner seeks the

Supreme Court's guidance by way of this Petition for a Writ of Certiorari.

42 U.S.C. § 406 was enacted to encourage attorney representation of those disabled individuals claiming Title II benefits by assuring that attorneys taking such cases would be paid adequately. Gowen v. Bowen, supra, 855 F. 2d at 619; Condon v. Bowen, 853 F. 2d 66, 70-71 (2d Cir. 1988); see also Hearings on H.R. 6675 Before the Senate Finance Comm., 89th Cong., 1st Sess. 512-13 (1965). The statute at the same time protects claimants by placing a ceiling on the amount of attorney's fees recoverable for representation at both the administrative and court levels. 42 U.S.C. § 406 (a), (b) (1); Gowen v. Bowen, supra, 855 F. 2d at 619.

As noted above, the Secretary has the internal mechanisms of overpayment and recoupment for withholding attorney's fees and ultimately paying such fees to

attorneys who have received a fee award. The individual attorney, on the other hand, is severely limited in collection efforts by 42 U.S.C. § 407, which provides:

> [N]one of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Thus where, as here, the claimant no longer has the funds earmarked for attorney's fees but mistakenly paid to the claimant by the Secretary, and the claimant is no longer willing to reimburse his or her attorney, the petitioner has virtually no method of recovery directly against the claimant. Only the Secretary has authority to remedy this situation created by the Social Security Administration's own "error."

To adopt the Secretary's argument that the federal courts cannot order the Secretary to pay the petitioner his duly

authorized administrative fees in the face of the Secretary's inaction would fly in the face of the legislative intent underlying the attorney's fee provisions of 42 U.S.C. § 406. As noted above, the overriding goal behind § 406 is to promote adequate legal representation of disabled persons by assuring attorney's fees. The Secretary argues here that his failure to withhold attorney's fees was an alleged "error." This contention is hard to believe in light of the long line of similar cases in which the Secretary "erroneously" failed to withhold attorney's fees for this petitioner. These cases indicate a pattern or policy of refusing to withhold administrative fees rather than an isolated error. See, e.g., Trekas v. Bowen, No. 88-2101EA (8th Cir. May 12, 1989), rehearing denied (8th Cir. June 9, 1989), cert. denied, 58 U.S.L.W. 3214 (U.S. October 2, 1989) (No. 8802069); Russell v. Sullivan, 887 F. 2d

170 (8th Cir.1989), rehearing denied (1989), cert. denied, 110 S. Ct. 1473 (1990); Pittman v. Sullivan, 911 F. 2d 42 (8th Cir. 1990) rehearing denied (8th Cir. _____, 1990)(case presently pending before this Court); Hanusowski v. Sullivan, No. 90-2945 (8th Cir.)(case presently pending before the Eighth Circuit).

This policy of failing to withhold attorney's fees is not confined to cases arising in the Eighth Circuit. See, e.g., Roberts v. Schweiker, 655 F. Supp. 1105 (D.Del 1987); (re: Secretary's violation of regulations in failing to retain a percentage of benefits for attorney's fees); Strickland v. Bowen, 669 F. Supp. 1086 (M.D. Ga. 1987) (same).

Even if the Secretary's oversight in these cases was an honest error, such an error should not relieve the Secretary of his obligation under 42 U.S.C. § 406 and implementing regulations, particularly in

light of the purpose of the statute. To do so would clearly discourage representation of disability claimants in future interim benefits cases. Ordering the Secretary to pay the petitioner his administrative fees would create no particular hardship for the Administration. The Secretary already collects such fees in cases of past-due benefits, then recoups the overpayment to the claimant pursuant to 42 U.S.C. § 404 and 20 C.F.R. § 404.501 (a) (8) (See App. E). The mechanism is therefore in place within the Administration to remedy the petitioner's situation; the Secretary is simply being asked to use that mechanism. The same concerns which lead the courts to treat interim benefits as past-due benefits for purposes of setting an attorney's fee award should likewise guide the procedures for payment of those fees. Otherwise, the law establishing an

attorney's right to such fees would be rendered meaningless.

The Secretary's position--that he is not required to pay the petitioner and that he cannot be ordered by the Federal Court to do so--must be rejected for those equitable reasons noted above and legal reasons cited below. The law also provides judicial oversight in those cases where the Secretary exceeds his discretion and violates the law. As noted in Condon v. Bowen, supra, 853 F. 2d at 72, quoting Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979), the deference generally accorded the Secretary "'is constrained by [the court's] obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.' . . . It is for the courts, not the administrative agency, to decide conclusively questions of statutory construction." Thus, to the extent that the Secretary's failure to provide payment

in this case is based on his erroneous reading of the law, the federal courts must become involved.

Furthermore, as this Court noted in Motron v. Ruiz, 415 U.S. 199, 232 (1974),

> " . . . [the] agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, . . . but also to employ procedures that conform to the law."

(Citations omitted). As similarly explained in Garcia v. Neagle, 660 F. 2d 983, 988 (4th Cir. 1981), cert. denied, 454 U.S. 1153 (1982),

> " . . . even where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations. . . . Where the controlling statute indicates that particular agency action is committed to agency discretion, a court may review the action if there is a claim that the agency has violated constitutional, statutory, regulatory or other restrictions, but may not review agency action where the challenge is only to the decision itself."

See also Thomas v. Schweiker, 692 F. 2d 333, 336 (4th Cir. 1982) (following Garcia v. Neagle, supra).

In light of these authorities, the Secretary's contention that 42 U.S.C. § 406 (a) gives the Administration absolute discretion and sole authority over administrative fee decision, and thus removes such decisions from federal court scrutiny is without merit. The amount of the Secretary's award is not challenged here. Rather, the petitioner seeks an order demanding that the Secretary comply with the letter and spirit of the attorney fee provisions of the statute, regulations, and internal operating procedures, and actually pay him the award which has been duly authorized for his representation of the disability claimants identified above.

II. THE WEBB V. RICHARDSON 6TH CIRCUIT DOCTRINE, MORE COMMONLY KNOWN AS THE ONE-FEE-TRIBUNAL RULE, SHOULD BE THE LAW OF THE LAND.

The question of the respective roles of the Social Security Administration and the federal courts in carrying out the attorney fee provisions of Title II on these and similar facts is the subject of much dispute among the circuits. In Webb v. Richardson, 472 F. 2d 529 (6th Cir. 1972), for example, the court held that it was completely appropriate for the court not only to award attorney's fees for representation before the court on behalf of a Social Security claimant, but to set an administrative award as well. The Court adopted this approach for the sake of clarity and more adequately to carry out the purpose of the 25% statutory cap on all fees, both judicial and administrative, among other reasons. Id. at 536-37.

Other circuits, including the Eighth Circuit in the consolidated cases at bar, have applied the statute in a mechanistic fashion to reach a contrary result. See, e.g., McGuire v. Sullivan, 873 F. 2d 974 (7th Cir. 1989) (court without jurisdiction to award fee for services at administrative level); Guido v. Schweiker, 775 F. 2d 107, 109 (3d Cir. 1985) (same); Whitt v. Califano, 601 F. 2d 160, 161-62 (4th Cir. 1979) (same); McDonald v. Weinberger, 512 F. 2d 144, 146 (9th Cir. 1975) (same); Fenix v. Finch, 436 F. 2d 831, 838 (8th Cir. 1971) (same); Gardner v. Mendez, 373 F. 2d 488, 490 (1st Cir. 1967) (same).

Unlike those cases noted above, the Secretary has already set an administration award for the petitioner in these cases; the only question is whether the Federal Court should be allowed to order the actual payment of that award where the Secretary is refusing payment

due to the Administration's error in failing to withhold those funds from the claimant. Nonetheless, the larger issue of the appropriate role of the Federal Courts in deciding issues related to administrative fees is once again presented by the facts of this case.

Since there is a conflict with the Sixth Circuit's Webb, and all the other circuits which have ruled on the issue, this Court should grant the petition for writ of certiorari and declare Webb to be the law of the land. If the Courts were to follow the common-sense approach reflected by the Sixth Circuit's decision in Webb v. Richardson, supra, there would be no question that the Courts could become involved in this dispute.

The question of the Courts' role in administrative fee disputes has also arisen on facts more closely akin to this case. In Russell v. Sullivan, supra, the Eighth Circuit declined to order payment

of an attorney's administrative fee by the Secretary on the basis that because the Court is without jurisdiction to review the Secretary's fee awards, it is likewise has no authority to enforce an award issued by the Secretary. 887 F. 2d at 171. Russell contradicts Morton v. Ruiz, supra, and Garcia v. Neagle, supra, both of which support judicial review not of the amount of an administrative award itself, but of the procedures used to carry out that award where the Secretary fails to comply with the law. Russell is also in conflict with Motley v. Heckler, 605 F. Supp. 88 (W.D. Va. 1985), rev'd on other grounds, 800 F. 2d 1253 (4th Cir. 1986), in which the Court upheld the Social security Administration's practice of paying a fee directly to an attorney where it failed to withhold the proper amount from the claimant, and then charging the fee to the claimant as an overpayment against the claimant's

benefits, in the context of a Title XVI case.

In Bowen v. Galbreath, 485 U.S. 74 (1988), this Court held that the Federal Courts have no authority to order the Secretary to withhold attorney's fees from past-due benefits in Title XVI cases. However, the Court's clear distinction between Title XVI and Title II implied that such orders are completely appropriate in Title II cases. This case presents the Court with a unique opportunity to clarify the law and diffuse at least a portion of the rampant confusion and conflict which now prevails in Title II attorney's fees cases in the Circuit Courts. Without the Court's guidance, some circuit courts will continue to deny attorneys the fees--particularly for administrative representation--to which they are entitled by law and thus ultimately discourage legal representation of disability

claimants. To avoid this inequitable result, this petition for a writ of certiorari should be granted. The one-fee-tribunal rule would eliminate the need for the decision in Sullivan v. Hudson, 57 U.S.L.W. 4648 (U.S. June 12, 1989), where the Supreme Court held that the District Court may set an EAJA fee for services at the District Court level, as well as for administrative services after remand.

The Sullivan case came in time to stop the effects of the Kelly decision, which had just held that administrative services on remand were not subject to the Court's jurisdiction. Kelly v. Bowen, 862 F. 2d 1333 (8th Cir. 1988). The Court should extend the step all the way. This would eliminate duplicate fee petitions and would speed up the attorney fee process.

The present administrative fee process has many disincentives--"fee

chiseling" (the attorney did an admiral job, but the client is poor, so the fee is reduced); time delays (it can take two to three years to get a fee approved and we know from Burnett v. Heckler, 756 F. 2d 621 (8th Cir. 1985) that we do not collect interest for time delays); and, the one step appeal of an award, but never a judicial review.

We exhort the Court to declare the one-fee tribunal rule the law of the land.

III. THE APPELLATE COURT FAILED TO APPLY THE PROPER STANDARD IN RULING ON THE PETITIONER'S REQUEST FOR RETROACTIVE APPLICATION OF GOWEN V. BOWEN.

In the cases at bar, the Eighth Circuit declined to apply Gowen v. Bowen, supra, retroactively in response to the petitioner's contempt claim and thereby prevented the petitioner from obtaining the only relief available to him. The Eighth Circuit reasoned that seeking retroactive application of Gowen v. Bowen, supra, by way of a contempt proceeding

did not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed. For the reasons which follow, the Court's analysis was erroneous.

In Ex parte Robinson, 86 U.S. (19 Wall.) 505 (1874), quoted in 11 C. Wright & A. Miller, Federal Practice and Procedure § 2960 at 581-82 (2d ed. 1973), the Supreme Court said:

> The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

The power of Federal Courts to punish by contempt is now codified at 18 U.S.C. § 401. Pursuant to that statute, disobedience to a "lawful writ, process, order, rule, decree, or command" is

grounds for exercising the Court's contempt power. 18 U.S.C. § 401 (3).

Given the breadth of the Court's contempt power, the Eighth Circuit erred by characterizing the petitioner's contempt claim as an impermissible collateral attack. The Court obviously had the power to hold the Secretary in contempt. In this case, where virtually no other remedy was available, the case for contempt was unusually compelling.

Even if the Eighth Circuit was correct in finding that contempt was an inappropriate vehicle for applying Gowen v. Bowen, supra, retroactively, the Court had the power to fashion an equitable remedy and thereby afford the petitioner with his duly authorized administrative fees. The contempt power of the Court does not limit the Court's discretion to fashion an equitable remedy. Smith v. Bonds, 813 F. 2d 1299, 1303 (4th Cir.), cert. denied, 488 U.S. 868 (1987). The

Court need not choose between contempt or nothing. Alexander v. Hill, 707 F. 2d 780, 783 (4th Cir.), cert. denied, 464 U.S. 874 (1983); see also Berger v. Heckler, 771 F. 2d 1556, 1569 (2d Cir. 1985). Thus, in Alexander v. Hill, supra, where the plaintiff filed a motion seeking to hold state welfare officials in contempt for failing to timely implement a plan for processing ADC and Medicaid applications, the Court held that the District Court had the authority to impose remedial fines and penalties, despite the fact that there had been no finding of contempt or bad faith.

In this case, the Secretary refuses to pay the petitioner those administrative fees to which he is legally entitled. The Federal Courts provide the only avenue for challenging the Secretary's intransigence and consequently provide the only avenue for giving meaningful effect to 42 U.S.C. § 406 and its implementing regulations.

The Eighth Circuit greviously erred by failing to remedy the unjust and illegal situation created by the Secretary's refusal to comply with the law. Because fundamental federal issues concerning the proper role of the Federal Courts are here at issue, the Court should grant this Petition for a Writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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February 19, 1991.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-2911

Willie Oden, *

*

Appellant, *

*

v. *

*

Louis W. Sullivan, Secretary, *
Department of Health *
and Human Services, *

*

Appellee. *

No. 89-2912

Louise Brand, *

*

Appellant, *

*

v. *

*

Louis W. Sullivan, Secretary, *
Department of Health *
and Human Services, *

*

Appellee. *

No. 89-2913

William Jennings, *

Appellant, *

v. *

Louis W. Sullivan, Secretary, Department of Health and Human Services, *

Appellee. *

No. 89-2914

Lloyd Perrin, *

Appellant, *

v. *

Louis W. Sullivan, Secretary, Department of Health and Human Services, *

Appellee. *

Appeals from the United States District Court for the Eastern District of Arkansas

[UNPUBLISHED]

Submitted: October 12, 1990

Filed: December 13, 1990

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and VAN SICKLE,* Senior District Judge.

PER CURIAM.

In these consolidated appeals, the claimants successfully appealed the cessation of their Social Security disability benefits. Each claimant drew interim benefits during the appeal. Anthony W. Bartels, the attorney for the claimants, was awarded attorney's fees by the district court and administrative fees by the Social Security Administration (SSA) in each case. Under 42 U.S.C. § 406 (b) (1) (1989), awards are paid out of and may not exceed twenty-five percent of past-due benefits. The SSA paid the amount withheld in each case but this was

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*The HONORABLE BRUCE M. VAN SICKLE, Senior United States District Judge for the District of North Dakota, sitting by designation.

less than the amount awarded. Bartels asked the district court to hold the Secretary in contempt for failing to comply with the court's order. The court held that contempt was unavailable and that no other relief was permitted. Bartels appeals and we affirm.

In Gowen v. Bowen, 855 F. 2d 613, 618-19 (8th Cir. 1988), we held that past-due benefits must include interim benefits in determining attorney's fees under section 406. However, the district court did not abuse its discretion in denying the contempt motion because the Secretary complied with the express terms of the order. The order did not state that past-due benefits must include interim benefits and was issued before Gowen was decided.

In Pittman v. Sullivan, 911 F. 2d 42 (8th Cir. 1990), in an attempt to apply Gowen retroactively, the court held that a contempt proceeding was an impermissible

collateral attack on a court's order when that order had become final. The decision was based on res judicata. This decision controls this case. Although Pittman held that interim benefits were included in past-due benefits, we affirm the district court in denying the contempt motion and permitting no other relief because "'a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed . . . . '" United States v. Rylander, 460 U. S. 752, 756 (1983) (quoting Maggio v. Zietz, 333 U.S. 56, 69 1948)).

Judgment affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

WILLIE ODEN (SSN: 429-60-9910) PLAINTIFF

V. CIVIL NO. J-C-84-47

LOUIS W. SULLIVAN, M.D.
Secretary of Health and
Human Services DEFENDANT

ORDER

Presently pending is plaintiff's request to hold the Secretary in contempt for failure to comply with this Court's earlier order concerning attorney's fees. The motion was stayed pending the Eighth Circuit Court of Appeals decision in Davis v. Bowen, Case No. 89-1042, slip op. (October 25, 1989). The Eighth Circuit has now ruled, affirming the District Court's denial of contempt on the identical facts presented here. The decision in Davis disposes of plaintiff's contempt motion, and also holds that the fees orders denying an award based on interim benefits had become final,

unappealable, and binding by the time of the decision in Gowen v. Bowen, 855 F. 2d 613 (8th Cir. 1988). Therefore, not only is contempt not available to plaintiff, but there is no other relief permitted.

IT IS, THEREFORE, ORDERED that plaintiff's motion to hold the Secretary in contempt be, and it is hereby, denied.

Dated this 16th day of November, 1989.

/s/Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

LOUISE BRAND (SSN: 431-36-0526) PLAINTIFF

V. CIVIL NO. J-C-83-346

LOUIS W. SULLIVAN, M.D.
Secretary of Health and
Human Services DEFENDANT

ORDER

Presently pending is plaintiff's request to hold the Secretary in contempt for failure to comply with this Court's earlier order concerning attorney's fees. The motion was stayed pending the Eighth Circuit Court of Appeals decision in Davis v. Bowen, Case No. 89-1042, slip op. (October 25, 1989). The Eighth Circuit has now ruled, affirming the District Court's denial of contempt on the identical facts presented here. The decision in Davis disposes of plaintiff's contempt motion, and also holds that the fees orders denying an award based on interim benefits had become final,

unappealable, and binding by the time of the decision in Gowen v. Bowen, 855 F. 2d 613 (8th Cir. 1988). Therefore, not only is contempt not available to plaintiff, but there is no other relief permitted.

IT IS, THEREFORE, ORDERED that plaintiff's motion to hold the Secretary in contempt be, and it is hereby, denied.

Dated this 16th day of November, 1989.

/s/Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

WILLIAM E. JENNINGS (SSN: 432-96-6079) PLAINTIFF

V. CIVIL NO. J-C-84-52

LOUIS W. SULLIVAN, M.D. DEFENDANT

ORDER

Presently pending is plaintiff's request to hold the Secretary in contempt for failure to comply with this Court's earlier order concerning attorney's fees. The motion was stayed pending the Eighth Circuit Court of Appeals decision in Davis v. Bowen, Case No. 89-1042, slip op. (October 25, 1989). The Eighth Circuit has now ruled, affirming the District Court's denial of contempt on the identical facts presented here. The decision in Davis disposes of plaintiff's contempt motion, and also holds that the fees orders denying an award based on interim benefits had become final, unappealable, and binding by the time of

the decision in Gowen v. Bowen, 855 F. 2d 613 (8th Cir. 1988). Therefore, not only is contempt not available to plaintiff, but there is no other relief permitted.

IT IS THEREFORE ORDERED that plaintiff's motion to hold the Secretary in contempt be, and it is hereby, DENIED.

/s/Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

LLOYD PERRIN (SSN: 431-62-7274) PLAINTIFF

V. CIVIL NO. J-C-83-371

LOUIS W. SULLIVAN, M.D.
Secretary of Health and
Human Services DEFENDANT

ORDER

Presently pending is plaintiff's request to hold the Secretary in contempt for failure to comply with this Court's earlier order concerning attorney's fees. The motion was stayed pending the Eighth Circuit Court of Appeals decision in Davis v. Bowen, Case No. 89-1042, slip op. (October 25, 1989). The Eighth Circuit has now ruled, affirming the District Court's denial of contempt on the identical facts presented here. The decision in Davis disposes of plaintiff's contempt motion, and also holds that the fees orders denying an award based on interim benefits had become final,

unappealable, and binding by the time of the decision in Gowen v. Bowen, 855 F. 2d 613 (8th Cir. 1988). Therefore, not only is contempt not available to plaintiff, but there is no other relief permitted.

IT IS, THEREFORE, ORDERED that plaintiff's motion to hold the Secretary in contempt be, and it is hereby, denied.

Dated this 16th day of November, 1989.

/s/Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 89-2911/2912/2913/2914EA

Willie Oden, et al.,

Appellants,

v.

Louis W. Sullivan, etc.,

Appellee

Order Denying Petition for Rehearing
With Suggestion for Rehearing En Banc

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

February 11, 1991

Order Entered at the Direction fo the Court:
/s/Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX G

RELEVANT STATUTORY PROVISIONS

20 C.F.R. § 404.1720 (b) (4), provides in pertinent part:

> (b) **Charging and receiving a fee.** (1) The representative must file a written request with us before he or she may charge or receive a fee for his or her services.
>
> * * * *
>
> (4) If the representative is an attorney and the claimant is entitled to past-due benefits, we will pay the authorized fee, or a part of the authorized fee directly to the attorney out of past-due benefits subject to the limitations described in § 404.1730 (b) (1). If the representative is not an attorney we assume no responsibility for the payment of any fee that we have authorized.

20 C.F.R. § 404.1730 (b), provides in pertinent part:

> (b) **Fees we may authorize--(1) Attorneys.** Except as provided in paragraph (c) of this section, if we make a determination or decision in favor of a claimant who was represented by an attorney, and as a result of the determination or decision past-due benefits are payable, we will pay the attorney out of the past-due benefits the smallest of--
>
> (i) Twenty-five percent of the

total of past-due benefits;

(ii) The amount of the fee that we set; or

(iii) The amount agreed upon

between the attorney and the claimant represented.

20 C.F.R. § 404.501 (a) (8) provides in pertinent part:

> (a) **In general.** Section 204 of the Act provides for adjustment as set forth in §§ 404.502 and 404.503, in cases where an individual has received more or less than the correct payment due under title II of the Act. As used in this subpart, the term "overpayment" includes a payment in excess of the amount due under title II of the Act, a payment resulting from the failure to impose deductions or to suspend or reduce benefits under sections 203, 222 (b), 224, and 228 (c), and (d), and (e) of the Act (see Subpart E of this part), a payment pursuant to section 205 (n) of the Act in an amount in excess of the amount to which the individual is entitled under section 202 or 223 of the Act, a payment resulting from the failure to terminate benefits, and a payment where no amount is payable under title II of the Act. . . . The provisions for adjustment also apply in cases where through error:
>
> * * * *
>
> (8) A payment of past due benefits is made to an individual and such payment had not been reduced by the amount of attorney's fees payable

directly to an attorney under section 206 of the Act (see § 404.977).

42 U.S.C. § 406 is as follows:

(a) The Secretary may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Secretary, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Secretary. The Secretary may, after due notice and opportunity for hearing, suspend or prohibit from further practice before him any such person, agent, or attorney who refuses to comply with the Secretary's rules and regulations or who violates any provision of this section for which a penalty is prescribed. The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, and any agreement in

violation of such rules and regulations shall be void. Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall, notwithstanding section 405 (i) of this title, certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this subchapter by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Secretary shall be deemed guilty of a misdeameanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500

or by imprisonment not exceeding one year, or both.

(b) (1) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405 (i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.